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11 UNITED STATES OF AMERICA

12 UNITED STATES DISTRICT COURT
13
14 CENTRAL DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,) CR 05-578(B)-JFW
16 Plaintiff,) GOVERNMENT'S TRIAL MEMORANDUM
17 v.)
18 HORACIO YEPIZ,) Trial Date: August 18, 2009
Trial Time: 8:30 a.m.
19 Defendant.)
20)
21)
22)
_____)

23 I.

24 STATUS OF CASE

25 Trial is set for August 18, 2009, at 8:30 a.m.,
26 before the Honorable John F. Walter, United States District
27 Judge.

28 The estimated time for presentation of the government's

1 case-in-chief is approximately six days. In accordance with
2 the Court's order, the government has filed a copy of its
3 witness list.

4 Trial by jury has not been waived. In addition, the
5 government is filing a proposed summary of the indictment.

6 II.

7 CASE SUMMARY

8 On August 18, 2009, the government will proceed as to the
9 sole remaining defendant in the case, Horacio Yepiz, also
10 known as ("aka") Alberto Rodriguez, aka Horse. The government
11 previously proceeded to trial on August 9, 2006 against
12 defendants Rafael Yepiz, Arnold Sandoval, Manuel Yepiz,
13 Mariano Meza, Jesus Contreras, Gilberto Carrasco, Ruben
14 Medina, Joe Rangel, Ernesto Orozco Mendez, Francisco Zambrano,
15 Sergio Mejia, Jose Luis Mejia, and Hilda Yepiz in connection
16 with the 78-count First Superseding Indictment. Prior to the
17 August 9, 2006 trial, a number of defendants plead guilty and
18 the Court severed three death-eligible defendants. These
19 three defendants plead guilty before trial.

20 The 29-count Second Superseding Indictment (hereinafter,
21 the "Indictment") charges numerous crimes including Racketeer
22 Influenced and Corrupt Organizations ("RICO"), RICO
23 conspiracy, Violent Crimes in Aid of Racketeering charges,
24 narcotics conspiracy, substantive narcotics offenses, firearms
25 offenses, murder in furtherance of racketeering and drug
26 trafficking activities, accessory after the fact, money
27 laundering, and criminal forfeiture. Given that only the
28 remaining defendant is on trial at this time, the government

1 will proceed on only the following five counts of the Second
2 Superseding Indictment: Count One (Racketeering Acts One,
3 Four, and Seven), Count Two, Count Three, Count Five and Count
4 Twenty-Four.

5 These charges stem from defendant's membership in a
6 violent criminal street gang known as the Vineland Boys Gang
7 (hereinafter, the "VBS Enterprise"), which operates in the
8 Central District of California and elsewhere. The Indictment
9 sets forth defendant's illegal activities in furtherance of
10 the VBS Enterprise and a related drug conspiracy from 1992
11 until November 30, 2005. At trial, the government will prove
12 that the VBS Enterprise engaged in, among other things,
13 murder, conspiracy to commit murder, conspiracy to traffic in
14 narcotics, and narcotics trafficking.

15 III.

16 CHARGES, STATUTES, AND ELEMENTS

17 A. Count One - RICO [18 U.S.C. 1962(c)]

18 Count One charges a violation of the RICO statute, 18
19 U.S.C. § 1962(c). Count One charges defendant with violating
20 the RICO statute by being a member or associate of a RICO
21 enterprise (the VBS Enterprise), and with directing or
22 participating in the conduct of that enterprise through a
23 pattern of racketeering activity. The indictment alleges
24 twenty-one Racketeering Acts as part of that pattern of
25 racketeering activity. At trial, the government will proceed
26 as to only Racketeering Acts One, Four and Seven in Count One.
27 Racketeering Act One charges defendant with Conspiracy to
28 Distribute and Manufacture Narcotics. Racketeering Act Four

1 charges defendant with Possession with Intent to Distribute
2 Cocaine. Racketeering Act Seven charges defendant with
3 Conspiracy to Murder Eugenio Cruz and the Murder of Eugenio
4 Cruz.

5 In order to be found guilty of RICO, as charged in Count
6 One, the government must prove the following elements: (1)
7 there was an enterprise consisting of a group of persons
8 associated together for a common purpose of engaging in a
9 course of conduct; (2) the defendant was employed by or
10 associated with the enterprise; (3) the defendant conducted or
11 participated, directly or indirectly, in the conduct of the
12 affairs of the enterprise through a pattern of racketeering
13 activity or collection of unlawful debt; and (4) the
14 enterprise engaged in, or its activities in some way affected
15 commerce between one state and another state or between a
16 state or the United States and a foreign country. See Ninth
17 Circuit Model Jury Instruction 8.16 (2003).

18 B. Count Two - RICO Conspiracy [18 U.S.C. § 1962(d)]

19 Count Two charges a violation of the RICO conspiracy
20 statute, 18 U.S.C. § 1962(d). In order to be found guilty of
21 this crime, the government must prove the following elements:
22 (1) there was an enterprise, as previously defined, (2) the
23 enterprise engaged in, or its activities affected, interstate
24 or foreign commerce; (3) the defendant was associated with the
25 enterprise; and (4) the defendant knowingly and intentionally
26 entered into an agreement to conduct, or participate in the
27 conduct of, the affairs of the enterprise through a pattern of
28 racketeering activity, that is the defendant must have agreed

1 that at some time during the life of the conspiracy he or some
2 other member or members of the conspiracy would commit, on
3 behalf of the conspiracy, at least two related acts of
4 racketeering as defined below. See United States v.
5 Fernandez, 388 F.3d 1199, 1231 (9th Cir. 2004); United States
6 v. Shryock, 342 F.3d 948, 987 (9th Cir. 2003); United States
7 v. Blinder, 10 F.3d 1468, 1477 (9th Cir. 1993); Baumer v.
8 Pachl, 8 F.3d 1341, 1346 (9th Cir. 1993); United States v.
9 Tille, 729 F.2d 615, 619 (9th Cir. 1984); United States v.
10 Brooklier, 685 F.2d 1208, 1216 (9th Cir. 1982).¹

11 C. Count Three - Narcotics Conspiracy [21 U.S.C. § 846]

12 Count Three charges a narcotics conspiracy in violation
13 of 21 U.S.C. § 846. The objects of the conspiracy as to which
14 the government will proceed at trial are as follows: (1)
15 distribute at least five kilograms of a mixture or substance
16 containing a detectable amount of cocaine, a schedule II
17 narcotic drug controlled substance; (2) manufacture at least
18 50 grams of a mixture or substance containing a detectable
19 amount of cocaine base (crack), a schedule II narcotic drug
20 controlled substance; and (3) distribute at least 500 grams of
21 a mixture or substance containing a detectable amount of
22 methamphetamine, or at least 50 grams of actual
23 methamphetamine, a schedule II controlled substance.

24 The essential elements of a drug conspiracy are: (1) an
25 agreement between two or more persons to commit at least one
26

27 ¹ There is no Ninth Circuit Model jury instruction for
28 RICO Conspiracy. However, the stated elements are consistent
with the caselaw and in past cases in this district juries have
been instructed on these elements for 18 U.S.C. § 1962(d).

1 of the objects of the conspiracy as charged in the indictment;
 2 and (2) the defendant became a member of the conspiracy
 3 knowing of at least one of its objects and intending to help
 4 accomplish it. See Ninth Circuit Model Jury Instruction 8.16
 5 (2003); United States v. Mesa-Farias, 53 F.3d 258, 260 (9th
 6 Cir. 1995); United States v. Litteral, 910 F.2d 547, 550 (9th
 7 Cir. 1990).²

8 D. Count 5 - VICAR [18 U.S.C. § 1959(a)]

9 Defendant is charged in Count Five with Violent Crime in
 10 Aid of Racketeering ("VICAR") for the murder of Eugenio Cruz,
 11 in violation of California Penal Code, Sections 31 and 187,
 12 and 18 U.S.C. § 1959(a).

13 In order to be found guilty of violating Title 18, United
 14 States Code, Section 1959(a), the following must be true: (1)
 15 the enterprise alleged in the Indictment existed; (ii) the
 16 enterprise affected interstate or foreign commerce; (iii) the
 17 defendant must have committed the violent crime specified in
 18 the particular count; and (iv) the defendant must have
 19 committed the crime for the purpose of gaining entrance to, or
 20 maintaining or increasing his position in, or for the purpose
 21 of receiving money from the enterprise. See 18 U.S.C. § 1959;
 22 United States v. Bracy, 67 F.3d 1421, 1429-30 (9th Cir. 1995);
 23 United States v. Vasquez-Velasco, 15 F.3d 833, 842 (9th Cir.
 24 1994).³

25
 26 ² The government will file a special verdict form in this
 27 matter which will require that if the jury finds the defendant
 28 guilty of any one of the charged controlled substances offenses,
 the jury must make additional findings as to drug quantity.

³ There is no Ninth Circuit Model Jury Instruction for
 VICAR.

1 E. Count 24 - Using or Carrying a Firearm During a Crime of
 2 Violence [18 U.S.C. §§ 924(c)(1)(A)(ii) and (iii),
 3 (j)(1)]

4 Defendant is charged in Count Twenty-Four with using and
 5 carrying a firearm, during and in relation to a crime of
 6 violence, namely Violent Crime in Aid of Racketeering, as
 7 alleged in Count Five of the Indictment, in violation of 18
 8 U.S.C. § 924(c). Count Twenty-Four further alleges that
 9 defendant brandished and discharged that firearm, and caused
 10 the death of a person through the use of the firearm in
 11 circumstances constituting murder as defined in Title 18,
 12 United States Code, Section 1111.

13 In order to be guilty of this offense, the government
 14 must prove: (1) the defendant committed the underlying crime
 15 of violence as charged in the indictment; (2) the defendant
 16 knowingly used, carried, possessed, brandished, or discharged
 17 a firearm; and (3) the defendant did so during and in relation
 18 to the underlying crime of violence.⁴ See Ninth Cir. Model
 19 Jury Instruction 8.65 (2003).

20 IV.

21 DEFINITIONS

22 A. RICO DEFINITIONS

23 1. "Enterprise"

24 An "enterprise" includes any individual, partnership,
 25 corporation, association, or other legal entity, and any union

26 ⁴ Section 924(c) provides for different penalties
 27 depending upon whether the firearm was brandished, or
 28 discharged. 18 U.S.C. § 924(c). As such, the special verdict
 form which the government submits will ask the jury to make
 findings as to whether defendant brandished or discharged the
 firearm.

1 or group of individuals associated in fact although not a
2 legal entity. See 18 U.S.C. § 1961(4).

3 2. "Racketeering Activity"

4 "Racketeering activity" includes any act or threat
5 involving murder, kidnaping, robbery, extortion, or dealing in
6 a controlled substance or listed chemical, which is chargeable
7 under state law and punishable by imprisonment for more than
8 one year.

9
10 3. "Pattern of Racketeering Activity"

11 A "pattern of racketeering activity" is at least two
12 racketeering acts within ten years of each other. See 18
13 U.S.C. § 1961(5). In order to form a "pattern," these two
14 acts must be related to each other and pose a threat of
15 continuing activity. H.J. Inc. v. Northwestern Bell Telephone
16 Co., 109 S. Ct. 2893, 2900-02 (1989); United States v.
17 Fernandez, 388 F.3d 1199, 1221 (9th Cir. 2004), cert. denied,
18 544 U.S. 1009 (2005).

19 V.

20 PERTINENT LAW

21 A. LAW RELATING TO RICO

22 1. Enterprise

23 In order to establish the existence of an
24 associated-in-fact enterprise, the government must submit
25 proof that the Vineland Boys Gang constituted "a group of
26 persons associated together for a common purpose of engaging
27 in a course of conduct." United States v. Turkette, 452 U.S.
28 576, 583 (1981). As recently articulated by the United States

1 Supreme Court, "an association-in-fact enterprise must have at
2 least three structural features: a purpose, relationships
3 among those associated with the enterprise, and longevity
4 sufficient to permit these associates to pursue the
5 enterprise's purpose." Boyle v. United States, No. 07-1309,
6 6-7 (June 8, 2009).

7 The existence of an enterprise is a separate element that
8 must be proved. The existence of an enterprise, however, may
9 be inferred from the evidence showing that persons associated
10 with the enterprise engage in a pattern of racketeering
11 activity. Id. at 8.

12 RICO reaches peripheral figures as well as the central
13 insiders in the enterprise. United States v. Tille, 729 F.2d
14 615, 620 (9th Cir. 1984).

15 2. Effect on Interstate Commerce

16 The courts have held that a slight effect on interstate
17 commerce is all that is required for a RICO violation. United
18 States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979). In fact,
19 only a "de minimis" effect on interstate commerce is required
20 to meet RICO's jurisdictional element. Fernandez, 388 F.3d at
21 1218. It is the activities of the enterprise, not each
22 predicate act, which must affect interstate commerce. United
23 States v. Bagnariol, 665 F.2d 877, 892 (9th Cir. 1981); Rone,
24 598 F.2d at 573. Here, the requisite effect on interstate
25 commerce will be established by evidence that one of the
26 enterprise's primary activities was to engage in, and to
27 encourage, narcotics trafficking, including trafficking in
28 cocaine, methamphetamine, and marijuana. See United States v.

1 Alvarez, 860 F.2d 801, 820 (7th Cir. 1988) (trafficking in
2 heroin which comes from Mexico satisfies RICO interstate
3 commerce requirement).

4 3. Pattern of Racketeering Activity

5 In order to establish that the affairs of the enterprise
6 were conducted through a pattern of racketeering activity, it
7 is sufficient that the government demonstrate that "the
8 predicate offenses are related to the activities of th[e]
9 enterprise." United States v. Scotto, 641 F.2d 47, 54 (2d
10 Cir. 1980).

11 4. RICO Conspiracy

12 Section 1962(d) makes it a separate crime to conspire to
13 commit a violation of Section 1962(c). A violation requires
14 proof that there was an agreement among the co-conspirators to
15 conduct or participate in the affairs of an enterprise.
16 Salinas v. United States, 118 S. Ct. 469, 476-78 (1997). It
17 does not require an agreement by each co-conspirator to commit
18 at least two racketeering acts. Id.

19 B. LAW RELATING TO CONSPIRACIES IN GENERAL

20 1. Participation in the Conspiracy

21 The government must show that a conspiracy between at
22 least two people existed and that the defendant was a member
23 of the conspiracy charged. See, e.g., United States v. Reese,
24 775 F.2d 1066, 1071 (9th Cir. 1985). Once a conspiracy is
25 proven, evidence establishing beyond a reasonable doubt the
26 defendant's connection to that conspiracy - even if the
27 connection is slight - is sufficient to convict him of
28 knowingly participating in the conspiracy. See, e.g., United

1 States v. Stauffer, 922 F.2d 508, 514-515 (9th Cir. 1990).
2 Every member of a conspiracy need not know every other member
3 nor be aware of all acts committed in furtherance of the
4 conspiracy. See, e.g., United States v. Taren-Palma, 997 F.2d
5 525, 530 (9th Cir. 1993).

6 2. Co-conspirator Declarations

7 Declarations by one co-conspirator during the course of
8 and in furtherance of the conspiracy may be used against
9 another conspirator because such declarations are not hearsay.
10 See Fed. R. Evid. 801(d)(2)(E). Further, statements made in
11 furtherance of a conspiracy were expressly held by the Supreme
12 Court in Crawford v. Washington, 541 U.S. 36, 56 (2004) to be
13 "not testimonial" such that their admission does not violate
14 the Confrontation Clause. As such, the admission of co-
15 conspirator statements pursuant to Fed. R. Evid. 801(d)(2)(E)
16 requires only a foundation that: (1) the declaration was made
17 during the life of the conspiracy; (2) it was made in
18 furtherance of the conspiracy; and (3) there is, including the
19 co-conspirator's declaration itself, sufficient proof of the
20 existence of the conspiracy and of the defendant's connection
21 to it. See also, Bourjaily v. United States, 483 U.S. 171,
22 173, 181 (1987). The government must prove by a preponderance
23 of the evidence that a statement is a co-conspirator
24 declaration in order for the statement to be admissible under
25 Rule 801(d)(2)(E). Bourjaily, 483 U.S. at 176; United States
26 v. Crespo de Llano, 838 F.2d 1006, 1017 (9th Cir. 1987).
27 Whether the government has met its burden is to be determined
28 by the trial judge, and not the jury. United States v.

1 Zavala-Serra, 853 F.2d 1512, 1514 (9th Cir. 1988).

2 The foundation for the admission of a co-conspirator
3 statement may be established before or after the admission of
4 the statement. If a proper foundation has not yet been laid,
5 the court may nevertheless admit the statement, but with an
6 admonition that the testimony will be stricken should the
7 conspiracy not be proved. United States v. Arbelaez, 719 F.2d
8 1453, 1469 (9th Cir. 1983); United States v. Kenny, 645 F.2d
9 1323, 1333-1334 (9th Cir. 1981).

10 It is not necessary that the defendant was present at the
11 time the statement was made. Sendejas v. United States, 428
12 F.2d 1040, 1045 (9th Cir. 1970). Once the existence of the
13 conspiracy is established, only "slight evidence" is needed to
14 connect the defendant and declarant to it. Crespo De Llano,
15 838 F.2d at 1017. The declaration itself, together with
16 independent evidence, may constitute sufficient proof of the
17 existence of the conspiracy and the involvement of the
18 defendant and declarant in it. Bourjaily, 483 U.S. at 181.

19 The term "in furtherance of the conspiracy" is construed
20 broadly to include statements made to "induce enlistment or
21 further participation in the group's activities," to "prompt
22 further action on the part of conspirators," to "reassure
23 members of a conspiracy's continued existence," to "allay a
24 coconspirator's fears," and to "keep coconspirators abreast of
25 an ongoing conspiracy's activities." United States v.
26 Yarborough, 852 F.2d 1522, 1535-1536 (9th Cir. 1988) (citing
27 cases). Statements made with the intent of furthering the
28 conspiracy are admissible whether or not they actually result

1 in any benefit to the conspiracy. United States v. Williams,
2 989 F.2d 1061, 1068 (9th Cir. 1993). Co-conspirator
3 declarations can be made to government informants and
4 undercover agents. See, e.g., United States v. Zavala-Serra,
5 853 F.2d 1512, 1516 (9th Cir. 1988) (agents); United States v.
6 Tille, 729 F.2d 615, 620 (9th Cir. 1984) (informants). In
7 addition, "[i]n determining whether a statement is made 'in
8 furtherance of' a conspiracy, the court looks to the
9 declarant's intent in making the statement, not the actual
10 effect of the statement." Williams, 989 F.2d at 1068.

11 Courts have found the following to be statements "in
12 furtherance of the conspiracy": (a) statements made to induce
13 enlistment in the conspiracy (United States v. Arias-
14 Villanueva, 998 F.2d 1491, 1502 (9th Cir. 1993)); (b)
15 statements made to keep a conspirator abreast of a
16 co-conspirator's activity, or to induce continued
17 participation in a conspiracy, or to allay the fears of a
18 co-conspirator (Arias-Villanueva, 998 F.2d at 1502); (c)
19 statements made to prompt action in furtherance of the
20 conspiracy by either of the participants to the conversation
21 (United States v. Layton, 720 F.2d 548, 556 (9th Cir. 1983));
22 (d) statements related to the concealment of the criminal
23 enterprise (Tille, 729 F.2d at 620); (e) statement identifying
24 another co-conspirator as a source for the drugs to be sold to
25 purchaser (United States v. Lechuga, 888 F.2d 1472, 1480 (5th
26 Cir. 1989)); (f) "puffing," boasts and other conversation
27 designed to obtain the confidence of another conspirator (or
28 apparent conspirator who actually was an undercover agent)

1 (United States v. Santiago, 837 F.2d 1545, 1549 (11th Cir.
2 1988) ("bragging" and boasts by co-conspirator admissible in
3 defendant's trial as statements in furtherance of conspiracy);
4 United States v. Miller, 664 F.2d 94, 98 (5th Cir. 1981)
5 ("[p]uffing, boasts, and other conversations . . . are
6 admissible when used by the declarant to obtain the confidence
7 of one involved in the conspiracy."); and (g) statements
8 recounting the co-conspirator's past criminal activities
9 (United States v. Esacove, 943 F.2d 3, 5 (5th Cir. 1991);
10 United States v. McLernon, 746 F.2d 1098, 1105-06 (6th Cir.
11 1984) (holding that there is no requirement that co-
12 conspirator have personal knowledge of his statements and
13 admitting co-conspirator's statements that he had been in the
14 cocaine business for 20 years and worked with other defendants
15 as in furtherance of conspiracy)).

16 VI.

17 EVIDENTIARY ISSUES

18 A. EXPERT TESTIMONY

19 If specialized knowledge will assist the trier of fact in
20 understanding the evidence or determining a fact in issue, a
21 qualified expert witness may provide opinion testimony on the
22 issue in question. Fed. R. Evid. 702. An expert's opinion
23 may be based on hearsay or facts not in evidence, where the
24 facts or data relied upon are of the type reasonably relied
25 upon by experts in the field. Fed. R. Evid. 703. An expert
26 may provide opinion testimony even if it embraces an ultimate
27 issue to be decided by the trier of fact. Fed. R. Evid. 704.
28 The court has broad discretion to determine whether to admit

1 expert testimony. United States v. Andersson, 813 F.2d 1450,
2 1458 (9th Cir. 1987).

3 The government anticipates calling numerous expert
4 witnesses in this case. In compliance with the Court's order,
5 the government filed on August 13, 2009 a complete list of its
6 expert witnesses and an offer of proof regarding their
7 testimony.

8 B. CROSS EXAMINATION OF DEFENDANT'S CHARACTER WITNESSES

9 On cross-examination of defendant's character witnesses,
10 the government may inquire into specific instances of
11 defendant's past conduct relevant to the character trait at
12 issue. Fed. R. Evid. 405(a); Michelson v. United States, 335
13 U.S. 469, 479 (1948).

14 VII.

15 CONCLUSION

16 The government respectfully requests leave to file
17 supplemental memoranda as may become necessary during trial.

18 DATED: August 13, 2009

Respectfully submitted,

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